(3)

No. 99-1733

Supreme Court, U.S.
FILED
MAY 31 2000
CLERK

IN THE

Supreme Court of the United States

SHOPPERS FOOD WAREHOUSE MD CORP.,
Petitioner,

v.

ASUNCION MORENO,
Respondent.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE FOOD MARKETING INSTITUTE IN SUPPORT OF PETITIONER

STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H. Street, N.W.
Washington, D.C. 20062
(202) 463-5337

R. HEWITT PATE
Counsel of Record
MICHAEL R. SHEBELSKIE
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200

Attorneys for Amici Curiae, The Chamber of Commerce of the United States and The Food Marketing Institute

May 31, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

22 pp

IN THE

Supreme Court of the United States

No. 99-1733

SHOPPERS FOOD WAREHOUSE MD CORP.,
Petitioner,

VS.

ASUNCION MORENO,
Respondent.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE FOOD MARKETING INSTITUTE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States (the Chamber) and The Food Marketing Institute (FMI) hereby move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amici curiae*. Counsel for the Petitioner has consented to the filing of this brief; counsel for the Respondent has not consented.

The Chamber is a prominent federation of business companies and associations with substantial membership in each of the 50 States and the District of Columbia. FMI is a nonprofit association of approximately 1,500 food retailers and wholesalers and their customers in the United States and abroad. *Amici* are well positioned to provide the Court with

insight concerning the significance of this case of a broader scope than is available to the parties alone.

The jurisdictional issue presented in this case is of great significance to the Chamber, FMI, and their members. The current state of the law with respect to jurisdiction predicated on advertising alone is in disarray, adding greatly to the litigation costs and uncertainties incurred by members of the Chamber and FMI. The Chamber and FMI respectfully submit that they are well positioned to offer the Court additional information as to the significance of the question presented and the ways in which legal uncertainty and confusion will worsen absent guidance from this Court.

For the foregoing reasons, *amici* respectfully request leave to file the attached brief.

Respectfully submitted,

R. HEWITT PATE
Counsel of Record
MICHAEL R. SHEBELSKIE
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804)788-8200

STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for Amici Curiae, The Chamber of Commerce of the United States and The Food Marketing Institute

May 31, 2000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

QUESTION PRESENTED 4

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE QUESTION PRESENTED HAS DEEPLY DIVIDED THE LOWER COURTS AND HAS CREATED CONFUSION AND DELAY IN THE ORDERLY DISPOSITION OF CASES 5

II. THE DECISION BELOW OBLITERATES THE DISTINCTION BETWEEN GENERAL AND SPECIFIC JURISDICTION AND VIOLATES THE DUE PROCESS LIMITATIONS ON THE EXERCISE OF *IN PERSONAM* JURISDICTION .. 13

CONCLUSION 16

TABLE OF AUTHORITIES

Cases — Page

Alexander v. Circus Circus Enterprises, Inc., 939 F.2d 847 (9th Cir. 1991) 7
American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) 2
Auer v. Robbins, 519 U.S. 452 (1997) 2
Brown v. Pro Football, Inc., 518 U.S. 231 (1996) 2
Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 5, 6, 10
Burlington Industries v. Ellerth, 524 U.S. 742 (1998) 2
Calder v. Jones, 465 U.S. 783 (1984) 6
Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) ..... *passim*
Chiaphua Components, Ltd. v. West Bend Co., 2000 WL 512855 (4th Cir. April 27, 2000) 11
Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990) 12
Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996) 13
Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 2
Hanson v. Denckla, 357 U.S. 235 (1958) 13
Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) 6, 14, 15
Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) 11
Insurance Corp. v. Compagnie des Bauxites, 456 U.S. 694 (1982) 5
International Shoe Co. v. Washington, 326 U.S. 310 (1945) 5
Katz v. United States, 389 U.S. 347 (1967) 12
Keeton v. Hustler Magazine, 465 U.S. 770(1984) .. 6, 10
Kolstad v. ADA, 527 U.S. 526 (1999) 2

TABLE OF AUTHORITIES—Continued

Page

Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1338 (E.D. Mo. 1996) 11

Maryland v. Craig, 497 U.S. 836 (1990) 12

McGee v. International Life Insurance Co., 355 U.S. 220 (1957) 9

Navarro Savings Association v. Lee, 446 U.S. 458 (1980) 6, 7

Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952) 14

Pizarro v. Hoteles Concorde International, C.A., 907 F.2d 1256 (1st Cir.1990) 7

Quality King Distributors, Inc. v. L'anza Research International, Inc., 523 U.S. 135 (1998) 3

Rannoch, Inc. v. Rannoch Corp., 52 F. Supp. 2d 681 (E.D. Va. 1999) 11

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 12

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) 10-12

Shaffer v. Heitner, 433 U.S. 186 (1977) 12

World-Wide Volkswagen Corp. v Woodson, 444 U.S. 286 (1980) 5, 10, 13

Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) 11

IN THE

Supreme Court of the United States

No. 99-1733

SHOPPERS FOOD WAREHOUSE MD CORP.,
Petitioner,

v.

ASUNCION MORENO,
Respondent.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE FOOD MARKETING INSTITUTE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States (the Chamber) and The Food Marketing Institute (FMI), as *amici curiae*, respectfully submit this brief in support of the petitioner.[1]

STATEMENT OF INTEREST

The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the fifty states and the District of Columbia, the

[1] This brief was written entirely by counsel for the Chamber and FMI, and no person or entity other than the Chamber and FMI, their members, or their counsel have made any monetary contribution to the preparation or submission of this brief.

Chamber represents an underlying membership of nearly 3,000,000 businesses and organizations, with approximately 140,000 direct members of every size, in every sector of the economy, and every region of the country. The vast majority of the Chamber's members are small businesses.

An important function of the Chamber is to represent the interests of its members in important matters before the federal courts as well as before Congress and the Executive Branch, including federal agencies and commissions. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases before this Court that have raised issues of vital concern to the nation's business community. Recent representative cases in which the Chamber has filed *amicus curiae* briefs include: *Kolstad v. ADA*, 527 U.S. 526 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Auer v. Robbins*, 519 U.S. 452 (1997); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995).

Significantly, the Chamber filed *amicus curiae* briefs both at the petition stage and on the merits in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), a case in which the Court previously considered, but did not decide, the jurisdictional question presented by the petition here. As stated in the Chamber's briefs in *Carnival Cruise*, the Chamber conducted a survey among its membership at that time. That survey revealed that resolution of the jurisdictional question was of substantial concern to the Chamber's membership because of the uncertainties and inefficiencies engendered by the unsettled state of the law and because of the costs entailed in complying with a rule like that adopted by the lower court here. *See* Motion of the Chamber of Commerce of the United States for Leave to File Brief *Amicus Curiae* in Support of Petitioner (No. 89-1647) at 2-3; Brief *Amicus Curiae* of the Chamber of Commerce of the United States in Support of the Petitioner

(No. 89-1647) at 10 (hereafter, Chamber *Carnival Cruise* Brief).

In the years since *Carnival Cruise*, the division and confusion among the lower courts over the jurisdictional question at issue here has not diminished, but has worsened as more courts have considered the issue and have continued to issue inconsistent holdings. The interests that justified the Chamber's participation in *Carnival Cruise* thus not only still exist, but have become more pressing in the intervening decade.

FMI is a nonprofit association that conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 members and their subsidiaries—food retailers and wholesalers and their customers in the United States and around the world. FMI's domestic member companies operate approximately 21,000 retail food stores with a combined annual sales volume of $220 billion—more than half of all grocery store sales in the United States. FMI's retail membership is composed of large multi-store chains, small regional firms, and independent supermarkets.

Like the Chamber, FMI has filed *amicus curiae* briefs in cases before the Court that implicate issues of special concern to its members. *E.g.*, *Quality King Distributors, Inc. v. L'anza Research International, Inc.*, 523 U.S. 135 (1998). This is such a case. Like petitioner, FMI's members regularly advertise their retail food stores in newspapers and other media. They thus face the same risk as petitioner of being haled into court in a State based solely on that advertising, despite the fact that they might maintain no operations in the State and that the claims against them do not arise out of or relate to that advertising. That risk imposes significant costs on FMI's members, and ultimately on the broad segment of consumers who shop at the thousands of retail stores operated by those members.

QUESTION PRESENTED

May a long-arm statute constitutionally reach a nonresident defendant when the defendant's only activities in the forum consist of advertising and when the out-of-state accident did not arise from that advertising?

SUMMARY OF ARGUMENT

The lower federal and state courts are hopelessly divided on the standards governing the exercise of personal jurisdiction over nonresident defendants. This confusion has a deleterious effect on the administration of justice, as it yields unpredictable outcomes and encourages protracted and expensive litigation over what ought to be a straightforward threshold issue. This confusion also has deleterious effects outside the courtroom. Because it is uncertain what activities will subject a nonresident defendant to a State's long-arm jurisdiction, many businesses find it practically impossible or prohibitively expensive to structure their affairs so as to avoid being haled into court in distant States with which they have no meaningful contacts.

These problems are not limited to a particular industry or geographic region, but affect all sectors of the economy throughout the country. New communications technologies like the Internet only compound the problem, because they provide an additional source of potential contacts on which a State can rely to exercise jurisdiction over a nonresident defendant. This situation can only be corrected by guidance from this Court.

The approach adopted by the court below also eliminates the distinction between general and specific jurisdiction. This approach allows a State to exercise jurisdiction over a nonresident defendant without regard to the limits imposed by due process on each form of *in personam* jurisdiction. The petition should be granted so the Court can provide needed

instruction to the lower courts that such an approach is constitutionally infirm.

ARGUMENT

I. THE QUESTION PRESENTED HAS DEEPLY DIVIDED THE LOWER COURTS AND HAS CREATED CONFUSION AND DELAY IN THE ORDERLY DISPOSITION OF CASES

The proper exercise of personal jurisdiction is a bedrock constitutional principle of extreme importance. As this Court has recognized, the due process constraints on the exercise of personal jurisdiction are a fundamental liberty interest. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.13 (1985); *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702-03 & n.10 (1982). That interest ensures that a person is not bound by a judgment of a forum with which he lacks meaningful relations. *Burger King*, 471 U.S. at 471-72; *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

The due process constraints on the exercise of personal jurisdiction also play a critical role in fostering federalism and interstate comity. The due process clause "operates to restrict state power." *Burger King*, 471 U.S. at 472 n.13. This preserves the authority of each State to adjudicate claims in which it has a legitimate interest by preventing other States with tangential, or non-existent, interests from rendering "binding judgments" over the former's citizens. *Id.* at 471-72; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

In light of the profound importance of jurisdictional rules to individual liberties and our structure of government, the application of those rules ought to be clear and direct. Jurisdictional rules that engender confusion and extensive litigation render a great disservice to courts and litigants. As

this Court stated in *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980):

> "It is of first importance to have a definition . . . [that] will not invite extensive threshold litigation over jurisdiction," although the resulting "differentiations of treatment . . . appear somewhat arbitrary." American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts 128 (1969). "Jurisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources." Currie, The Federal Courts and the American Law Institute, Part I, 36 *U. Chi. L. Rev.* 1 (1968).

Given the confusion and division among the lower courts over the jurisdictional question presented here, the exercise of personal jurisdiction over nonresident defendants is anything but "as self-regulated as breathing." This Court has labored to provide direction to the exercise of specific personal jurisdiction by providing a two-step analysis that considers (1) whether the defendant purposefully availed itself of the benefits of the forum by activities directed at the forum and (2) whether the claims against the defendant "arise out of or relate to" those activities. *E.g.*, *Burger King*, 471 U.S. at 472.

This Court has addressed on several occasions the first of those criteria. *E.g.*, *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). The Court, however, has not explained the meaning and limits of the second criterion. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984) (declining to rule whether "arise out of" has same meaning as "relate to"). Because of that lack of direction, lower courts have developed differing and often internally inconsistent approaches toward the application of that criterion, as described in the petition in this case.

As a result, cases brought against nonresident defendants often entail protracted and expensive litigation over the issue whether the case, in the words of *Navarro*, "is in the right court." Litigants, and courts, are uncertain what standard determines the existence of personal jurisdiction. Even where a court has expressed a standard, litigants are often left guessing how it applies to a particular case, since the rules some courts have adopted in this area produce inconsistent results with seemingly similar fact patterns.

This is best demonstrated by the inconsistent treatment petitioner has received before the District of Columbia Court of Appeals and the United States Court of Appeals for the District of Columbia. *See* Pet. at 4. Similar inconsistencies, however, exist throughout the country. *Compare Alexander v. Circus Circus Enterprises, Inc.*, 939 F.2d 847 (9th Cir. 1991), opinion withdrawn and superseded on other grounds, 972 F.2d 261 (1992) (occasional newspaper ads in forum state and maintenance of toll-free number create jurisdiction over nonresident hotel operator) *with Pizarro v. Hoteles Concorde International, C.A.*, 907 F.2d 1256 (1st Cir. 1990) (placement of occasional ads in forum state did not create jurisdiction over nonresident hotel operator). Consequently, litigants have every incentive to litigate fully the existence of personal jurisdiction because the answer to the question is seldom self-evident, thereby extending the lawsuit and increasing the costs of litigation.

The facts of this case bear out this phenomenon. Respondent's accident happened on October 20, 1993. Pet. at 3. Respondent acted with dispatch in pursuing her claim, filing suit on April 5, 1994. *Id.* But any swiftness to her claim ended then. Because petitioner believed, rightly, that personal jurisdiction did not exist over it in the District of Columbia, petitioner sought to dismiss the action on that grounds. What followed was extensive litigation over the threshold question of whether respondent's claim was in the right court. There were

several rounds of briefing and hearings on the issue before the trial court, both before and after trial. The same is true at the appellate level, with the jurisdictional issue in this case receiving consideration by a three-judge panel and then by the court *en banc*.

No one can fault petitioner for pressing its jurisdictional argument. Given the unsettled state of the law and the sharply divided *en banc* decision below, no one can gainsay that petitioner has been justified in pursuing its defense. Nonetheless, the parties have been required to expend considerable attorney's fees and time in litigating the issue, with the consequence that more than six years have passed since respondent filed suit. Despite that passage of those years, the threshold question whether this lawsuit was filed in the "right court" still is not resolved.

Such a state of affairs should be unacceptable. It is unfair to both plaintiffs and defendants. It is a time-consuming drain on judicial resources and the orderly administration of justice. And it engenders confusion and costs outside the courtroom, as individuals and businesses struggle to conduct their affairs without knowing what activities suffice to hale them into a distant forum to defend claims unrelated to that forum.

Nor is this a problem unique to businesses in the District of Columbia metropolitan area. All businesses that advertise in nationally distributed periodicals are exposed to the same jurisdictional risk as petitioner. Moreover, some degree of interstate contact is an almost inevitable consequence of business in our modern economy wholly apart from any advertising. As the Court has observed:

> [M]any commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines.

McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957). That statement is even more true today with the blossoming of telecopiers, computers and other forms of electronic communication. And although the contacts that supported jurisdiction in this case happened to be advertising, there is nothing that confines application of the rule applied below to advertising. In other words, any type of contact with a state—such as purchasing supplies from a vendor—might suffice to assert jurisdiction over a nonresident defendant if the claim being sued on does not have to arise from the defendant's contacts with the forum. So even if a business confined its advertising to a single jurisdiction, it still most likely would not be immune from suit in other states.

The burdens that businesses face as a consequence are real. As the survey among the Chamber's members found at the time of *Carnival Cruise*, uncertainty about the States that can exercise jurisdiction over a company may induce the company to curtail its operations out of fear over being sued in distant States, to the detriment of consumers and an efficient market. Alternatively, the costs of doing business—and ultimately the amount paid by consumers for goods and services—may increase as businesses labor to conform their conduct to unique and unfamiliar laws of multiple States in order to protect themselves in the event they are sued in a foreign State and judged under that State's law. Accompanying this burden is likely to be substantially increased insurance costs to protect against suits in foreign jurisdictions. *See* Chamber *Carnival Cruise* Brief, p. 10.

This burden is especially difficult on small businesses that do not operate on a national scale. Such businesses have no rational basis on which to gauge the jurisdictional risk they face of suit in foreign States and therefore must safeguard against all such risks. The Chamber's survey revealed that the costs of such compliance is prohibitive to most small businesses.

The costs and uncertainties engendered by the current confused state of the law can only be addressed by this Court. This Court has held that accepted notions of fairness and justice required by due process dictate that long-arm statutes must be administered in a manner that provides "'a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimal assurance as to where that conduct will and will not render them liable to suit." *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). It is that predictability that gives potential defendants the "fair warning," *Keeton*, 465 U.S. at 774, required by due process about the potential jurisdictional consequences of their activities. There is no predictability now. The petition in this case presents an ideal opportunity for the Court to rectify the situation, to dispel the confusion that currently prevails and to provide much needed order to this important area of the law.

Indeed, the need for such clarity is even more compelling now than when the Court granted certiorari on this issue in *Carnival Cruise* in light of the burgeoning, and inconsistent, jurisprudence regarding personal jurisdiction and the Internet. When the Court granted certiorari in *Carnival Cruise*, the use of the Internet for commercial purposes essentially did not exist. In the intervening decade there has been a veritable explosion in the commercial and personal use of the Internet. The number of individuals on-line grows daily, with millions of Americans having Internet access at home or work. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 850 (1997) ("The Internet has experienced 'extraordinary growth.' . . . About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999."). The Internet is literally ushering a commercial revolution among American businesses, with billions of dollars of sales over the Internet, which continue to grow each year.

Cf. Reno, 521 U.S. 844, 853 (1997) (describing Internet as "a sprawling mall offering goods and services").

The use and growth of the Internet affects every sector of the economy and all size businesses, from Fortune 500 companies to the sole proprietorships. Its greatest impact, however, may be among small businesses, where the Internet provides a cost-effective means to reach and communicate with more customers than traditional media.

Along with this explosion in use has come an ever expanding number of judicial decisions that grapple with the exercise of personal jurisdiction over an out-of-state defendant based on the defendant's use of or presence on the Internet. Not surprisingly, the inconsistencies that plague the lower courts' treatment of personal jurisdiction based on contacts through traditional media such as newspapers and television have carried over to Internet cases. For example, comparing a web page to an advertisement in a newspaper or on television, some courts hold that personal jurisdiction exists over a defendant that maintains a web page wherever the web page can be accessed. That, of course, is anywhere in the world. *E.g., Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1338 (E.D. Mo. 1996); *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996). In contrast, other courts have required something more than a mere presence on the Internet, although the definition of that necessary additional quantum is often ill-defined and inconsistently applied. *E.g., Chiaphua Components, Ltd. v. West Bend Co.*, 2000 WL 512855 (4th Cir. April 27, 2000); *Rannoch, Inc. v. Rannoch Corp.*, 52 F. Supp. 2d 681 (E.D. Va. 1999); *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

This confusion and inconsistency in the treatment of Internet contacts springs from the same source as the confusion and inconsistency that the parties faced in this case, namely, uncertainty regarding "the relationship among the defendant,

the forum, and the litigation," *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977), necessary to support the exercise of specific jurisdiction over a nonresident defendant. The costs imposed by that confusion will continue to grow as the use of the Internet expands, guaranteeing more lengthy and expensive litigation. Indeed, that confusion could ultimately inhibit the full potential of the Internet if businesses begin to shy away from using the Internet out of fear that they will subject themselves to suit everywhere in the country if they maintain a Web page advertising their business.

And it is not only the Internet that poses additional opportunities for confusion over the exercise of personal jurisdiction. With the advent of other technologies, businesses increasingly find that their advertisements are going farther afield from their home states. With cable and satellite broadcasting, for instance, television signals may be broadcast or receivable throughout the country. Similar effects can occur when two technologies merge. For example, most radio stations now routinely broadcast their signals simultaneously over the air and the Internet. Under the logic of the decision below, a business that contracted for advertising on such a radio station now may be subject to suit in every State.

This Court has shown a keen awareness of the need to keep American law current with the swift pace of modern technology. The Court has, of course, once addressed First Amendment issues and the Internet. *Reno*, 521 U.S. 844 (1997). The Court also has addressed in many other contexts the application of legal principles affected by technological changes. *E.g.*, *Maryland v. Craig*, 497 U.S. 836 (1990) (Sixth Amendment implications of closed-circuit transmission of witness testimony); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (implications of modern medical life support mechanisms on right to privacy); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (applying First Amendment in the context of radio broadcasting); *Katz v.*

United States, 389 U.S. 347 (1967) (applying Fourth Amendment to electronic eavesdropping devices).

In that vein, a guiding force in the Court's enunciation of the modern law of *in personam* jurisdiction has been the need to adapt that law to the contemporary marketplace. *World-Wide Volkswagen*, 444 U.S. at 293-94; *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958). Although the specific factual background of this case involves an advertisement in a newspaper, the question it raises has profound and wide-ranging implications for the use of new communications technologies by American businesses. In this case, the Court can provide much needed guidance regarding the limits of specific personal jurisdictional posed by technological advances in the contemporary marketplace. Absent such direction, the inconsistent judicial treatment of those issues will continue unabated and, potentially, impede the effectiveness and advantages those technologies can offer American businesses and consumers. *Cf. Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 776-77 (1996) (Souter, J., concurring) ("And as broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.")

II. THE DECISION BELOW OBLITERATES THE DISTINCTION BETWEEN GENERAL AND SPECIFIC JURISDICTION AND VIOLATES THE DUE PROCESS LIMITATIONS ON THE EXERCISE OF *IN PERSONAM* JURISDICTION

This Court has explicated on multiple occasions the differences between general and specific *in personam* jurisdiction. General jurisdiction does not require a nexus between the cause of action and the defendant's contacts with

the forum State. The exercise of such jurisdiction, however, is appropriate only if the defendant maintains a "continuous and systematic" presence in the forum state. *E.g., Helicopteros Nacionales*, 466 U.S. at 414 nn.8-9; *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 438 (1952). It is that continuous and systematic presence that satisfies due process and permits the exercise of such jurisdiction, for a party that maintains a continuous and systematic presence in a State has "fair warning" it could be sued there.

Specific jurisdiction, in contrast, does not require the defendant to have a continuous and systematic presence in the forum State. To the contrary, any minimum contact is all that is necessary. However, two other conditions must exist for the exercise of specific jurisdiction to satisfy due process. As discussed above, they are (1) the defendant must have purposefully directed some activity at the forum; and (2) the claim must "arise from or relate to" those activities. *See supra* at 7. It is the fulfillment of these two conditions that constitutionally permits the exercise of personal jurisdiction based on minimum contacts.

The court below effectively collapsed the two categories of jurisdiction and circumvented the due process safeguards applicable to each category. None of the courts below found that petitioner's advertising in the District of Columbia rose to the level of a continuous and systematic presence. Thus, the exercise of general jurisdiction over petitioner was forbidden. But so was the exercise of specific jurisdiction. That is because respondent's cause of action did not arise from petitioner's minimum contacts with the District of Columbia, *i.e.*, its advertising in that jurisdiction. Nonetheless, the court below held that jurisdiction existed over the petitioner, clearly contravening this Court's established precedent.

To achieve that untoward result, the court below took advantage of this Court's decision not to address in

Helicopteros the issue whether the terms "arise out of" and "relate to" mean the same thing. The District of Columbia Court of Appeals decreed that the two terms are not synonyms. This enabled that court, by its way of thinking, to dispense altogether with any consideration whether respondent's cause of action arises out of petitioner's advertising in the District of Columbia and to concentrate instead on the term "relate to." And to determine the meaning of that term, the District of Columbia court fell back on the first of the traditional requirements for specific jurisdiction, *i.e.*, the requirement that the defendant's activities be purposefully directed towards the forum. In a linguistic leap that the meaning of the words plainly cannot bear, the court below held that if petitioner's advertising was purposefully directed toward the District of Columbia, then respondent's cause of action related to that advertising. In other words, the court below equated the two criteria, and in doing so, effectively eliminated the second criterion for specific jurisdiction. All the court below required for the exercise of specific jurisdiction over petitioner was for petitioner to have some minimum contact—if even one act—purposefully directed at the District of Columbia.

That result clearly contravenes the settled principles governing personal jurisdiction enunciated by this Court. The decision below, however, is representative of the pitfalls lower courts around the country are creating because they lack guidance on these issues from this Court. The Court should grant the petition so it can provide that guidance and preserve the due process protections that properly constrain the exercise of *in personam* jurisdiction.

CONCLUSION

For the foregoing reasons, and for those stated in the petition, the Court should grant the petition.

Respectfully submitted,

R. HEWITT PATE
Counsel of Record
MICHAEL R. SHEBELSKIE
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804)788-8200

STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for Amici Curiae, The Chamber of Commerce of the United States and The Food Marketing Institute

May 31, 2000